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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 551

ALLAN D. EMIL, AS TRUSTEE IN BANKRUPTCY OF JOHN M. RUSSELL, INC., PETITIONER,

vs.

HARRY HANLEY, RECEIVER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 27, 1942.

CERTIORARI GRANTED JANUARY 4, 1943.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of JOHN M. RUSSELL, INC., Bankrupt

ALLAN D. EMIL, as Trustee in Bankruptcy of John M. Russell, Inc., Appellant,

HARRY HANLEY, Receiver, Appellee

STATEMENT UNDER RULE XIII

The proceeding leading to the order under appeal was begun by motion based on a petition of the trustee, verified August 15th, 1941, accompanied by notice of motion dated August 15th, 1941. The object of the motion was to require Harry Hanley, Receiver appointed in the Supreme Court, Nassau County in a foreclosure action of Frederick Russell against John M. Russell, Inc., the bankrupt, to file his accounting in the bankruptcy court.

The motion was heard before Hon. Matthew T. Abruzzo, in the United States District Court, Eastern District of New York. An order was entered by Judge Abruzzo denying the motion on February 10, 1942. The appeal was taken by notice of appeal dated March 7th, 1942.

The trustee appeared by David Haar, Esq., as his attorney, and the appellee, Harry Hanley, as receiver, appeared by Richards, Smyth & McGrath, Esqs.

There has been no change of either parties or attorneys in this proceeding.

[fol. 2] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In the Matter of JOHN M. RUSSELL, INC., Bankrupt

NOTICE OF MOTION

SIR:

Please take notice, that upon the annexed petition of Allan D. Emil, the Trustee herein, duly verified the 15th day of August, 1941, and on the proceedings had herein,

the undersigned will move this Court at a bankruptcy term thereof, to be held in the Post Office Building, in the Borough of Brooklyn, City of New York, on the 22nd day of August, 1941, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order requiring Harry Hanley, Receiver appointed by the Supreme Court, Nassau County in the foreclosure action of Frederick Russell against John M. Russell, Inc., the bankrupt herein, to file his accounting of receipts and disbursements with the referee in charge of these proceedings and be subject to all the rights and obligations with respect to such accounting as if he were a receiver of this court, and for such other and further relief as in the premises may seem proper.

Dated, New York, August 15th, 1941.

Yours, etc., David Haar, Attorney for Trustee, 270 Broadway, New York City.

To John P. McGrath, Esq., Attorney for Harry Hanley, Receiver, 66 Court Street, Brooklyn, N. Y.

[fol. 3] IN UNITED STATES DISTRICT COURT

PETITION OF ALLAN D. EMIL, READ IN SUPPORT OF MOTION

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The petition of Allan D. Emil, respectfully shows:

1. Your petitioner is the trustee of the above named estate, having been duly appointed on the 29th day of November, 1940 and having qualified by filing the bond required.

2. At the time of the filing of the petition in bankruptcy, the bankrupt was the owner of a certain apartment house completed about two or three months before, and located at 150 South Middle Neck Road, Great Neck, L. I. Likewise at that time there was pending a suit in foreclosure on behalf of a third mortgagee, who held a mortgage of $16,000 which was then past due.

3. In the course of the foreclosure action, the Supreme Court in Nassau County appointed Harry Hanley, Esq.,

as receiver of the rents and profits of the building pending the foreclosure suit.

4. Your petitioner is informed by Mr. Haar that the judgment of foreclosure and sale in which Mr. Hanley was appointed receiver, was entered some time ago, and the sale was scheduled for August 6th, 1941, and that on motion made by the party who claims to be the owner of the property, by reason of a sale held under a foreclosure of mechanics' liens, the sale under the judgment of foreclosure of the third mortgagee was postponed until August 14th, 1941.

[fol. 4] 5. Your petitioner is informed that on the day prior to August 14th, 1941, the plaintiff in the action seeking to foreclose a third mortgage, and for which a judgment of foreclosure and sale have already been entered, transferred the judgment by assignment or otherwise to some person or parties unknown, and that the sale was thereupon abandoned.

6. A prior motion on behalf of the receiver to settle his account in the Supreme Court came on for hearing on August 11th, 1941, but after argument in open court it was withdrawn. It is now apparent that it is necessary to settle the account of the receiver who, as I have been informed, has about $6,000.00 in his possession, subject to the commissions of the receiver and compensation of his counsel.

7. It is therefore obvious that if the motion made by Mr. Hanley, above referred to, is for an order passing his account, the motion is premature; the receiver has not yet completed his duties in administering the property pending the sale, and the transfer of title to a purchaser by Referee's deed.

8. Your petitioner has been informed by his attorney, Mr. Haar, that the attention of the receiver's attorney has been called to that part of the Bankruptcy Law, which requires a State Court receiver, who administers property in actual, or constructive possession of the bankruptcy court after the filing of the petition in bankruptcy, to account for receipts and disbursements in connection with the property of the bankruptcy Court. Mr. Haar informs your petitioner that he has written twice to the attorney

for the receiver, requesting him to file such an accounting with the Referee, Mr. Fluckiger. In spite of such requests, Mr. Hanley, the receiver, has nevertheless made this motion above referred to, presumably ignoring the bankruptcy law [fol. 5] and the jurisdiction of this court, and proceeding in the State Court which appointed him as receiver, with his accounting.

9. Your petitioner is informed and verily believes that the second and third mortgages are under the control of the present owner of the property, who bought it on the foreclosure of some mechanics liens which had been filed against the property shortly before the filing of the petition in bankruptcy. The sale on the foreclosure of the mechanics lien judgment took place some time in February or March of 1941.

10. This being the situation, to wit, that the owner is in control of the judgment on the foreclosure brought by the third mortgagee, and is also the owner of the second mortgage, which mortgagee also started a foreclosure suit, it must be obvious to the Court that the owner will do nothing to bring on either judgment, and certainly not the third mortgagee's judgment of foreclosure, to a sale. Undoubtedly, he will make an effort to take whatever moneys the receiver has into his own possession, to the exclusion of the rights of your petitioner as trustee. Indeed, Mr. Haar, my attorney, informs me that that suggestion was made in open court on the argument on August 11th, 1941 in the Supreme Court, when the receiver's account was presented for settlement but was withdrawn.

11. The receiver's accounting of the receipts and disbursements as presented to the Supreme Court on the motion above referred to, shows that he was appointed on August 17th, 1940, but did not take possession of any moneys, to wit, did not collect any rents from the property until after September 1st, 1940. The petition in bankruptcy was filed August 31st, 1940.

[fol. 6] 12. Under the circumstances, your petitioner believes that under the Bankruptcy Act, as amended, in 1938, and under the decisions of the Supreme Court and other courts interpreting the rights of a trustee in bankruptcy with respect to moneys received by a receiver appointed by a State Court but who collects moneys from the bank-

rupt's property after the filing of the petition, that such a receiver should be required to account in the Bankruptcy Court for such receipts and disbursements.

Wherefore, your petitioner respectfully prays that an order be made requiring Harry Hanley, Receiver appointed by the Supreme Court in Nassau County in the foreclosure action of Frederick Russell, third mortgagee, against the bankrupt above named, to file his accounting of receipts and disbursements with the referee in charge of these proceedings, and be subject to all the rights and obligations with respect to such accounting as if he were a receiver of this court, and your petitioner prays for such other relief as may be proper.

Dated, New York, August 15th, 1941.

Allan D. Emil, Petitioner.

(Verified August 15, 1941.)

[fol. 7] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN P. MCGRATH, READ IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of Kings, ss:

JOHN P. MCGRATH, being duly sworn, deposes and says that he is an attorney and counsellor-at-law duly admitted to practice in the Courts of the State of New York and in this Court. That your deponent is the attorney for Harry Hanley, Receiver of the rents and profits of a certain apartment building located in Great Neck, New York, the fee title to which was in John M. Russell, Inc., at the time of the appointment of said Harry Hanley.

That the said Harry Hanley desires the record herein to indicate that he appears specially, for the sole and exclusive purpose of contesting the jurisdiction of this Court, and for that purpose alone begs leave to submit the following facts:

That on August 17th, 1940, an order was made by the Honorable Algeron I. Nova, Justice of the Supreme Court of the State of New York, appointing said Harry Hanley

Receiver of the rents and profits of a three-story forty-five family apartment building located at Great Neck, Nassau County, New York. That the said order was made in an action brought in the Supreme Court of the State of New York, Nassau County, by Frederick Russell, as plaintiff, against John M. Russell, Inc., and others, as Defendants. That the said action was brought to foreclose a mortgage in the sum of Sixteen Thousand Nine Hundred Dollars ($16,900) upon the said property, for non-payment of the principal thereof and of certain interest and taxes past due thereon. That prior to August 13th, 1940 the said action had been commenced by the service of the summons and [fol. 8] complaint therein upon John M. Russell, Inc. That the petition in bankruptcy of John M. Russell, Inc. was not filed until August 31st, 1940, and hence the State Court had had jurisdiction of the foreclosure action and had taken possession of the apartment building at least two weeks before the filing of the petition in bankruptcy.

That Harry Hanley duly qualified as said Receiver by filing a bond in the sum of Twelve Thousand Dollars ($12,000), and has been in actual possession of the mortgaged premises since August 17th, 1940, and actually collected rents from said premises during the month of August, 1940, and during every month thereafter, to and including the month of August, 1941.

That at the time of the commencement of the foreclosure action in which Harry Hanley was appointed Receiver, there were many mechanics lienors who held liens on the property and who had not been paid. An action in the Supreme Court, Nassau County, was brought by one or more of these lienors to have their liens determined and for a foreclosure and sale of the property in order to satisfy these liens. Deponent is informed that said action was reduced to judgment, and that a sale of the mortgaged premises was had under foreclosure in the said action brought by the said mechanics lienors. That the sale was held on or about February 21st, 1941. At said sale the premises were bid in by a corporation known as Apartment Investing Corporation for the sum of about Twenty Thousand Dollars ($20,000). At that time, upon information and belief, the bankrupt estate was effectually divested of any and all interest which it may have had in the said mortgaged premises. Said foreclosure sale was

subject to the mortgage under foreclosure in the action in which Harry Hanley is Receiver, and also to two prior mortgages.

Meanwhile, the action brought by Frederick Russell, in which Harry Hanley is the Receiver, continued, and upon [fol. 9] information and belief judgment was entered therein on or about June 13th, 1941. The premises were duly advertised for sale pursuant to said judgment, and were scheduled to be sold August 6th, 1941. The sale was adjourned once, to August 14th, 1941. Before the said sale was actually held, and on August 13th, 1941, deponent was informed and verily believes that the judgment in said action was paid and satisfied, and that this action was to be terminated subject only to the continuing jurisdiction in the Supreme Court of the State of New York, Nassau County, to settle the account of Harry Hanley, its Receiver, and direct the manner of distribution of the funds in his hands.

That during the course of the receivership Harry Hanley collected rents aggregating $30,533.05 and made disbursements aggregating $25,668.28, leaving a balance in his hands of $4,864.77, subject to his claim for commissions in the sum of $1,526.65 and the claim of his counsel for services in the sum of $1,000. Deponent is advised and verily believes that since the foreclosure action was commenced and the Receiver appointed prior to the filing of the petition in bankruptcy, the State Court obtained jurisdiction of the said foreclosure action for all purposes, and that jurisdiction to administer the receivership, control the expenditures of the Receiver and settle his accounts and direct his discharge are part and parcel of the State Court's jurisdiction in the action, and that the Receiver is within the exclusive control of the State Court. The Trustee in Bankruptcy and his attorney have pointed out to your deponent that under Section 69(d) of the Bankruptcy Act, Receivers in the State Court are required to file their accounts in the Bankruptcy Court. Deponent construes this statute to mean Receivers of the general assets of a bankrupt, and it does not include a Receivership created in connection with the enforcement of a lien upon a specific parcel of real property. The Receiver [fol. 10] here has nothing whatever to do with the general assets of the bankrupt, but is merely the arm of the State Court, aiding and preserving a lien clearly within the con-

trol and under the jurisdiction of the State Court. Deponent has been advised of no decision of any Federal Court construing the Bankruptcy statute in the manner contended for by the Trustee in Bankruptcy, and diligent research by deponent has failed to disclose any such precedent.

The Receiver has already petitioned the Supreme Court, Nassau County, for a settlement of his accounts upon due notice to the Trustee in Bankruptcy and to all parties who appeared in the State Court action. This application is returnable on Friday, August 22nd, 1941, and it is anticipated that the State Court will make an order at that time settling the Receiver's accounts and directing his discharge. The Receiver is apprehensive that if this Court decides that it has jurisdiction in the premises and directs the Receiver to account in this Court, such determination may result in conflicting decisions as between the two Courts as regards the Receiver's stewardship, all of which will undoubtedly result in confusion and may impose upon the Receiver personally a burden of liability which would be unjust.

Verily, the Bankrupt Estate has no interest whatever in that portion of the receivership which transpired subsequent to the sale in February, 1941, which divested the Bankrupt Estate of all interest in the mortgaged premises. The State Court will have before it upon the Receiver's petition for settlement of his accounts the question as to the proper disposition of any balance in the Receiver's hands which is fairly allocable to rent collections from August 17th, 1940 to February 21st, 1941, during which time the Bankrupt Estate was still the record owner of the fee. If it is determined by the State Court that any part of those [fol. 11] rents is payable to the Trustee in Bankruptcy, the Receiver will of course make payment accordingly, and those funds will then come within the jurisdiction of the Bankruptcy Court.

Insofar as the allegations of the petition of the Trustee in Bankruptcy on this application are in conflict with the foregoing statement of facts, such allegations are denied by the Receiver.

For the foregoing reasons deponent contests the jurisdiction of this Court to make the order prayed for and respectfully asks that the motion be denied.

John P. McGrath.

(Sworn to August 21, 1941.)

IN UNITED STATES DISTRICT COURT

REPLY AFFIDAVIT OF DAVID HAAR, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

David Haar, being duly sworn, says:

I am the attorney for Allen D. Emil, the trustee of the above named bankrupt's estate, and submit this affidavit at the request of the Court. However, in so submitting it, I must respectfully protest against the receipt of any affidavits at this time which tend to show what took place in the accounting proceedings initiated by the receiver in the State Court. It is my opinion, which is submitted respectfully herein for whatever it may be worth, that the Court should decide this motion on the papers as [fol. 12] submitted on August 22nd, 1941, when the motion was presented to the Court for decision, argued and submitted.

However, since the Court has requested it, I state the following facts as briefly as I can, and from my recollection of what occurred:

In the first place, the Court's attention should be called to the fact that in the accounting it appeared that whatever rents were collected by Mr. Hanley, as Receiver, were collected beginning with September 1st, 1940, which is a date subsequent to the date of the filing of the petition against the bankrupt. Mr. Hanley was therefore in possession of property forming part of the assets of this estate. He was collecting rents which were the proceeds of property forming part of the assets of this estate. He was disbursing these rents, not in accordance with the Bankruptcy Act in such cases made and provided.

At the very outset of the hearing before Hon. Norman S. Dike, Official Referee, I stated that I was participating in the hearing under protest, and that it was my opinion at that time that the matter should be heard by the Bankruptcy Court, because the receiver was accounting for property and moneys belonging to the Bankruptcy Court. However, the hearing continued. Almost at the very outset, after only a few questions had been asked of the Receiver, Judge Dike stopped the examination which I

was conducting, with the remark, in substance, if not in words, that the receiver showed himself to be most incompetent, and that it would be an act of God if no loss was sustained as a result of his so-called administration.

The next witness on the stand was Mr. Shelley, to whom, apparently, the receiver had left the administration of the estate over which he had been appointed receiver. Mr. Shelly had been the superintendent of construction on behalf of the bankrupt. He admitted during the course of cross examination, that he was the principal, if not the sole [fol. 13] stockholder of a corporation that bought in the property at the end of February, 1941, at a foreclosure of mechanics liens. He also admitted that it was this corporation, to wit, the Apartment Investing Corp., that had paid off the amount due on the mortgage under foreclosure. Mr. Shelley was also the man who had received commissions from the receiver for rent of various apartments in the premises, altho no order had been made authorizing the receiver to retain a real estate agent for that purpose.

These are some of the outstanding facts adduced during the course of the hearing. There are others which need not now be referred to.

It appeared from the hearing, also, that the receiver's counsel admitted that the trustee was entitled to a refund of $60.00 of a deposit, $75.00 collected as rent from a man by the name of Kaufman, and $79.50 collected as rent from a man by the name of Welcker. It also appeared during the hearing, that the officer and stockholder of the bankrupt, Mr. Russell, was permitted to stay in an apartment, the rent of which was $67.50 per month, for a period of at least six months without paying any rent at all.

May I interrupt here to state that the point in issue, insofar as the trustee was concerned, was the ascertainment of the amount of rents collected or which should have been collected from September 1st, 1940 to February 28th, 1941, and the amounts properly disbursed within that period. The reason that period is taken is because the trustee took title as of August 31st, 1940, when the petition was filed and he was divested of title as of February 28th, 1941, when the sale under the foreclosure of the mechanics liens was held.

It appeared that during the month of February, Mr. Shelley bought a considerable amount of fuel oil, and

he admitted that a good deal of it was left on February [fol. 14] 28th, 1941. His counsel conceded that we were entitled to a credit of about $60.00 for that. It likewise appeared that Mr. Shelley had been paid commissions of $617.70, without authority and for no reason whatever that I could see from the evidence. It also appeared that school taxes were paid before February 28th, 1941 for the whole six months, as well as town taxes, amounting to about $800.00, the burden of which should have been taken over by the Apartment Investing Corp. who took title on February 28th, 1941.

As a result of the hearing, the Official Referee overruled every single objection interposed by the trustee. He allowed the receiver $1526.65 for his commissions as receiver, in spite of the characterization of him as an incompetent administrator, made in open court. He allowed his attorneys the sum of $1,000 for their fees, without taking into consideration the allocation of services rendered before and after February 28th, 1941, and he directed the balance to be paid to Apartment Investing Corp., which is Shelley's corporation.

These are some of the outstanding facts disclosed during the course of the hearings and in the order made by the Official Referee. As a result of that order, in spite even of the admissions made on the record that the trustee is entitled to some reimbursement, the trustee got nothing.

Now that this Court has these facts before it, it can see the purpose of the amendment passed in 1938 requiring receivers who administer property after bankruptcy intervenes, to make their accounting in the Bankruptcy Court. It was with that in mind, and because the law requires it that I made the motion on behalf of the truste last August, which motion is still pending.

It is my opinion that in spite of the so-called accounting and the order made in the State Court approving it in all respects and overruling every single objection of the [fol. 15] trustee to it, that this Court not only has power, but has the duty to require this receiver to give an accounting in the Bankruptcy Court, because the property he handled was bankrupt property in the constructive, if not the actual possession of the Court.

David Haar.

(Sworn to January 6, 1942.)

Answering Affidavit of John P. McGrath, Read in Opposition to Motion

State of New York,
County of Kings, ss:

John P. McGrath, being duly sworn, deposes and says:

That he is a member of the firm of Richards, Smyth & McGrath, attorneys for Harry Hanley, receiver of the rents and profits of certain real property located at Great Neck, Nassau County, New York, appointed in an action in the New York Supreme Court, Nassau County, entitled. Frederick Russell, plaintiff, against John M. Russell, Inc., et al., defendants. That the above named bankrupt was the owner of the equity of said real property. That the said court action was brougt to foreclose a third mortgage on the real property. That the said receiver acted from August 17th, 1940 to early August, 1941.

By notice of motion bearing date August 14th, 1941, the receiver made a motion in the New York Supreme Court, returnable August 22nd, 1941, for an order settling his ac- [fol. 16] counts and discharging him. Thereafter, and by notice of motion bearing date August 15th, 1941, the Trustee in Bankruptcy applied to this Court by motion returnable August 22nd, 1941, for an order requiring Harry Hanley, as receiver, to file his account in this court. Both motions were returnable on the same day. When the motion before this Court was called for argument, David Haar, Esq., appeared as attorney for the Trustee in Bankruptcy and deponent appeared as attorney for the receiver. Deponent pointed out that the accounting had been submitted to the New York Supreme Court for settlement. The Hon. Matthew T. Abruzzo, United States District Judge, before whom the Trustee's application was argued, indicated his inclination to permit the State Court to retain jurisdiction and determine the receiver's account and reserved decision on the Trustee's application.

Meanwhile, the Trustee in Bankruptcy had interposed objections to the receiver's account in the State Court and an order was made by Mr. Justice Froessel, on August 29th, 1941, referring the issues raised by said objections

to an Official Referee of the Supreme Court, to hear and determine the account and to pass upon the objections.

Thereafter, hearings were held before Hon. Norman S. Dike, Official Referee, on the 21st and 23rd days of October, 1941, at which time the issues raised by the Trustee's objections were fully heard. Thereafter and on November 28th, 1941, the said Official Referee, Hon. Norman S. Dike, made a decision overruling the objections interposed by the Truste and directing that the balance in the hands of the receiver, after payment of the receiver's statutory commissions and the fee of his attorneys, be paid over to Apartment Investing Corporation, the purchaser of the property at the mechanic's lien foreclosure sale in February, 1941. The Official Referee found, among other things that all rights of the bankrupt in the real property were [fol. 17] cut off as of February 24th, 1941 and that, on that day, there was a deficit in the receiver's account; that the balance of rents in the receiver's account in August, 1941 had accrued subsequent to the extinguishment of the bankrupt's interest in the property and should, therefore, be paid to the new owner.

That an order was entered on the decision of the said Official Referee, which order bears date December 3rd, 1941. Said order overrules the objections of the Trustee in Bankruptcy and approves the account of the receiver and directs his discharge and the cancellation of his bond.

Deponent respectfully submits that the issues raised by the Trustee in Bankruptcy were fully tried; that the Trustee was adequately represented upon the hearings and presented all his proof and that the determination of the New York State Supreme Court was made after a full and complete consideration of the merits and that this Court should not interfere therewith or require any further action on the part of the receiver.

This affidavit is submitted in accordance with the request of the Court, made in the presence of the attorney for the Trustee.

Wherefore, deponent prays that the motion of the Trustee in Bankruptcy be denied.

John P. McGrath.

(Sworn to January 6, 1942.)

[fol. 18] IN UNITED STATES DISTRICT COURT

OPINION OF ABRUZZO, D. J.

This is a motion instituted by the Trustee in bankruptcy for an order compelling the Receiver appointed in the Supreme Court of the State of New York in a foreclosure action to file with the Referee in this Court an accounting of his receipts and disbursements.

One, Harry Hanley, was appointed Receiver of the rents and profits of certain real property located at Great Neck, Nassau County, New York pursuant to a mortgage foreclosure action commenced in the Supreme Court of the State of New York, Nassau County. The bankrupt herein was the owner of the equity in the said property.

On Aug. 14, 1941, the receiver made a motion in the New York Supreme Court, returnable Aug. 22, 1941, for an order settling his accounts and discharging him. Thereafter, the trustee made the present motion in this Court.

In the Supreme Court of the State of New York, the trustee interposed objections to the receiver's accounting. As a result of the issues raised by these objections, the matter was referred to an Official Referee of the Supreme Court for determination. Hearings were held before the Official Referee on the 21st and 23d days of Oct. 1941, at which time the issues raised by the trustee's objections were fully heard. On Nov. 28, 1941, the Official Referee, in his decision on the motion, overruled the objections interposed by the trustee. An order on that decision was entered on Dec. 3, 1941. It is evident that the issues raised by the trustee were fully tried and a determination was made on the merits.

The trustee has cited Chapter 11, Sec. 2, subdiv. 21 and Chap. 7, Sec. 69, subd. d in support of this motion.

The latter section of the Bankruptcy Act seems to confer authority on this Court to compel a receiver or trustee, not appointed under the act, to account to the bankruptcy Court under which the proceeding is pending, for any action taken by him subsequent to the filing of the petition [fol. 19] in bankruptcy. The petition herein was filed on Aug. 31, 1940 and the receiver was appointed prior to that or on Aug. 17, 1940, for the purpose of collecting the rents of a particular piece of property. He was not a receiver of the general assets of the bankrupt and

was under the direct order of the New York Supreme Court. It is doubtful whether Sec. 69, sub. d of the act, affects a receiver appointed in a State court for the sole purpose of collecting rents from a specific parcel of land owned by the bankrupt, and disbursing the funds for the protection of the property.

Considering the two sections of the Bankruptcy Act cited by the trustee, it appears that in the event that this Court granted the trustee's motion, the receiver's accounting would be filed and the same objections would be interposed by the trustee. This would afford him two trials of the same issues already determined in the Supreme Court of the State of New York. A fair interpretation of the Bankruptcy Act leads to the conclusion that it was not intended to give two trials of the same issues. As was said in re: *National Motorship Corp.*, 96 Fed. 2d 88, "* * * state court's disposition was subject to assent of the bankruptcy court" indicating that full faith and credit can therefore be given by this court to the determination of the Supreme Court of the State of New York.

This motion is denied. Settle order on two (2) days notice.

M. A., U. S. D. J.

[fol. 20] IN UNITED STATES DISTRICT COURT

ORDER APPEALED FROM

Allen D. Emil, trustee in bankruptcy for the above named bankrupt having moved this Court for an order requiring Harry Hanley, receiver appointed by the Supreme Court, Nassau County, in the foreclosure entitled, "Frederick Russell against John M. Russell, Inc., et al.," to file his accounting of receipts and disbursements with the Referee herein and to subject himself to such rights and obligations with respect to such accounting as if he were receiver of this Court, and said motion having duly come on to be heard before me,

Now, upon the petition of Allen D. Emil, verified August 15th, 1941, the notice of motion dated August 15th, 1941, the affidavit of David Haar, Esq., verified January 6th, 1942, read in support of said motion, and the affidavits of John P. McGrath, verified respectively August 21st, 1941

and January 6th, 1942, in opposition thereto, and after hearing David Haar, Esq., attorney for the trustee, in support of said motion, and Richards, Smyth & McGrath, Esqs. (John P. McGrath, Esq., of counsel) attorneys for Harry Hanley, as receiver, in opposition thereto, and the undersigned having prepared and filed a decision herein, it is

On motion of Richards, Smyth & McGrath, attorneys for Harry Hanley, as Receiver,

Ordered that the said motion is in all respects denied.

Dated, Brooklyn, N. Y., February 10th, 1942.

M. T. Abruzzo, U. S. D. J.

[fol. 21] In United States District Court, Eastern District of New York

In the Matter of John M. Russell, Inc., Bankrupt

Notice of Appeal

Sirs:

Please take notice, that Allan D. Emil, the trustee of the above named bankrupt, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from an order made herein on the 10th day of February, 1942, and entered in the office of the Clerk of the United States District Court, Eastern District of New York, which order denies the motion made by the Trustee requiring Harry Hanley, receiver appointed by the Supreme Court, Nassau County, in the foreclosure entitled "Frederick Russell against John M. Russell, Inc., et al." to file his accounting of receipts and disbursements with the Referee herein, and he appeals from each and every part of said order.

Dated, New York, March 7th, 1942.

Yours, etc., David Haar, Attorney for Trustee, 270 Broadway, New York City.

To Richards, Smyth & McGrath, Esqs., Attorneys for Harry Hanley, 2650 Atlantic Avenue, Brooklyn, New York.

[fol. 22] In United States District Court, Eastern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is the record on appeal in the above entitled matter as agreed upon by the parties.

Dated, New York, April 1, 1942.

David Haar, Attorney for Appellant. John P. McGrath, Attorney for Appellee, Appearing Specially.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 24] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1941

No. 306

(Argued June 4, 1942. Decided July 29, 1942)

Allan D. Emil, Trustee, Appellant,

v.

Harry Hanley, Receiver, Appellee

Appeal from an order in bankruptcy of the District Court for the Eastern District of New York, denying the petition of a trustee in bankruptcy praying that a receiver, appointed by a state court in a foreclosure suit, should account to the referee.

Before L. Hand, Augustus N. Hand and Clark, Circuit Judges

David Haar for the appellant.
Francis A. McGrath for the appellee.

Opinion

[fol. 25] L. Hand, *Circuit Judge:*

This is an appeal from an order in bankruptcy which denied a motion of the bankrupt's trustee asking that a re-

ceiver in foreclosure appointed by the state court should account to the referee. The case was heard upon petition of the trustee with supporting and answering affidavits in which the following state of facts appeared. The petition in bankruptcy was filed on August 31, 1940 and the petitioner was appointed trustee in the following November. The bankrupt owned an apartment house which had been completed two or three months before (whether it was its only property or not does not appear), upon which there were three mortgages. At petition filed, an action to foreclose the third mortgage in the state court was pending, in which Hanley, the respondent, had been appointed receiver on August 17, 1940. He qualified on that day, collected the rents for the month of August and has collected those which fell due thereafter. Judgment of foreclosure was entered on June 13, 1941, the sale under which was set for August 6 and adjourned to August 14. On the 13th a corporation, known as Apartment Investing Corporation, paid and satisfied the mortgage, leaving nothing further to be done in the foreclosure suit except to pass the receiver's accounts; the same corporation had already on February 21, 1941, bought in the property under a judgment of foreclosure upon several mechanics' liens, junior to the mortgage. On August 14, 1941 the receiver moved in the state court for an order passing his accounts, and on the 15th the trustee made the motion now at bar to compel him to account in the bankruptcy court. Both motions were returnable on the 22nd, on which day the trustee appeared in the state court to protest against its jurisdiction; he was overruled, and on December 3, 1941, the receiver's accounts were passed, allowances were made to him and to his attorney, [fol. 26] he was discharged and his bond was cancelled. The district judge held this motion open meanwhile and denied it on February 10, 1942. The outcome of the appeal turns on whether §2(a) (21) and §69(d) of the Bankruptcy Act, which were added in 1938, gave exclusive jurisdiction to the bankruptcy court over the accounts of a receiver in foreclosure.

As soon as the receiver qualified, all the rents were sequestered for the benefit of the third mortgagee. That is the law of the state (*Sullivan* v. *Rosson*, 223 N. Y. 217) and the state law governs. *In Re Humeston*, 83 Fed. (2d) 187 (C. C. A. 2). The trustee questions whether the receiver is to be regarded as in possession before petition filed—Au-

gust 31, 1940—because he collected no rents until September 1st. As we have said, he qualified on August 17th, but he never took possession because he could not, the property being held on leases. Even if he could have taken possession, but failed to do so until September 1st, it would not have mattered, for priority between courts in point of jurisdiction depends, not upon the day when the property comes into their possession but upon that of the commencement of the first suit in which possession can be taken. *Farmers Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 61; *Palmer* v. *Texas*, 212 U. S. 118, 129; *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477; *Princess Lida* v. *Thompson*, 305 U. S. 456, 466. Before the addition of §2(a) (21) and §69(d) there was therefore no doubt that the jurisdiction of the bankruptcy court over foreclosure receivers—including the power to pass their accounts—depended upon the petition's being earlier than the suit. *Isaac* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Straton* v. *New*, 283 U. S. 318; *In Re Greenlie-Halliday Co.*, 57 Fed. (2d) 173 (C. C. A. 2); *Damel* v. *Wilson-Weesner-Wilkinson Co.*, 109 Fed. (2d) 364, 366 (C. C. A. 6). Such a receiver is quite unlike a re- [fol. 27] ceiver appointed in an "equity receivership" (*Duparquet H. & M. Co.* v. *Evans*, 297 U. S. 216), or a statutory state insolvency proceeding, both of which are entirely superseded by a later bankruptcy proceeding. *Straton* v. *New*, *supra*, 327. Thus, the only question is whether the sections added in 1938 assimilated the two receiverships.

There is every antecedent reason to say that they did not. They certainly contain no intimation of intention to subject pending foreclosure suits as a whole to the jurisdiction of the bankruptcy court; so far as appears, the state court may press such suits to judgment, may sell the property and distribute the proceeds; indeed this can hardly be questioned. If so, it would be altogether anomalous to divorce from the land itself the income which accrues *pendente lite*. Indeed, when a court takes possession of mortgaged land by its receiver, it in effect merely anticipates its final action, acting in harmony with the general axiom that equity regards as done what ought to be done; if all the necessary steps could be taken together in piepowder fashion, the property would be sold, the buyer would begin to receive the rents at once, and the mortgagee the interest upon the purchase price. The receivership is the nearest substitute; the rents are security

just as the land is security from the time when the court intervenes; they become part of the mortgaged *res* because only so can the mortgagee be protected during the inevitable delay. For this reason it is extremely unlikely that when Congress left to the state courts jurisdiction over the land it should have intended to separate the rents. Indeed, the receiver is as much an arm of the court as the master whom it appoints to conduct the sale; it is as unwarranted an invasion of its power to compel the receiver to account as to compel the master. Either the bankruptcy should supersede the whole suit, as it does in the case of a winding [fol. 28] up, or it should not touch it at all; the tail goes with the hide. As Professor Moore has well said (Collier on Bankruptcy, 14th Edition, pp. 307-309), "Here it will be noted that the receivership is a mere incident of the lien or claim which the non-bankruptcy court had undertaken prior to bankruptcy and that the property, upon the institution of the proceedings was in *custodia legis* of the non-bankruptcy court. And it would appear that it was not the intent of clause (21) to change the established law in that respect."

The only even plausible objection appears to us to rest upon the exception of proceedings under Chapters X and XII. The argument drawn from this is that it shows that the section applies to those chapters and that it must therefore *pro tanto* include receivers in foreclosure. This is certainly true as to Chapter X because one of the grounds for an involuntary petition is the pendency of a foreclosure suit or possession by a mortgage trustee, though the mortgage must cover the "greater portion of the property of the corporation." §131(3) and (4). Moreover, the "plan" in Chapter X—§216(1)—and the "arrangement" in Chapter XII—§416(1)—must include some modification of a valid mortgage. Yet this argument is not convincing, for there is nothing anomalous or inconsistent in saying that §2(a) (21), when applied to proceedings under these chapters includes foreclosure receivers, but does not when applied to "straight bankruptcy"—liquidation. Since the section merely granted a new remedy and was not intended to enlarge the jurisdiction of the bankruptcy court, the distinction was one which we should expect and which was indeed necessary. This is so because, even as to valid mortgages and other liens, proceedings under these chapters are supersessive, just as "straight bankruptcy" is supersessive as to

state insolvency proceedings or "equity receiverships." [fol. 29] The bankruptcy court should be able summarily to reduce to possession all property the interests in which it may have to adjust; it is only when the court has no power to do so that a state court should be allowed to retain a custody already acquired; but there is every reason when it has not, that the state court's jurisdiction should be respected. A state court can foreclose as well as a bankruptcy court; indeed, it is presumptively better fitted to do so for it is more apt to be familiar with the questions involved. For these reasons we think that the words, "receivers" and "trustees," may be read distributively, covering those occasions for which the new remedy is appropriate; that is, those in which under the previous law the bankruptcy court had exclusive jurisdiction.

We are not sure what Congress meant by the added phrase: "agents authorized to take possession of or liquidate a person's property"; but whatever those words include, it does not disturb the argument, for they should be understood to subject to summary dispossession only those "agents" who hold property that must be administered in the bankruptcy proceeding. However, it must be confessed that consistently one would have expected the exception also to have included proceedings under §77 to reorganize railroads, in which valid liens can be modified, §77(b)[2](1). At first blush it is hard to see why the summary remedy granted should have been cut off at four months in such proceedings. Possibly these were forgotten in the drafting; possibly it was thought that the remedy would not be likely to be invoked in the case of railroads anyway, since they constitute a very special problem. But, whatever the reason, the omission offers no obstacle to our conclusion, for the exception as to Chapters X and XII remains applicable as it stands, even if consistently it should have been broader. For these reasons we conclude that §2(a) (21) did not support the trustee's petition.

[fol. 30] That being true, little need be added as to §69(d). The phrase, "receiver or trustee, not appointed under this Act", is almost in the same words as §2(a) (21) and the variance cannot have indicated any change in intent; as the House report said, the section was intended as a guide for "equity receivers." Report #1409, 75th Congress, First Session. It made them accountable to the bankruptcy court, whether or not the trustee moved to dispossess them under

§2(a) (21); it required them to file a schedule of their property; it even forbade their disbursing any money without the bankruptcy court's consent. If this was meant also to cover foreclosure receivers in "straight bankruptcy," a revolutionary change, quite needless and galling to the state court's dignity, was too well hidden with what are at best very equivocal words.

Order affirmed.

Dissenting Opinion

Clark, *Circuit Judge* (dissenting):

I think that, under the express provisions of the Chandler Act, now appearing as Bankruptcy Act, §§2a(21), 69d, 11 U. S. C. A. §§11a(21), 109d, as well as by virtue of its policy and purpose, this receiver is subject to the supervision of the bankruptcy court as to his allowances and disbursements. The contrary view is arrived at only by a most violent contraction of the statutory language to make it fit into a framework of supposedly clear prior case law. As will appear from the discussion hereafter, I find the earlier precedents not clear, but highly confused, as to the meaning of "receiver" in applying the earlier bankruptcy act. But in any event, I believe it is a mistake to approach a problem as to the scope of new bankruptcy provisions supplied by the Chandler Act with an attitude of assimilating [fol. 31] them into pre-existing law. That Act represents a full-scale overhauling of the several types of debtor proceedings. Where the sections are entirely new, broad, and, on the surface, at war with old law, I think it much better to assume that the meaning to be attributed to them is one which squares with the general purpose of the Act, even if this should involve some departure from past case law.[1]

It is especially appropriate to approach §2a(21) in this manner because of its unique nature. This paragraph is

[1] Consider, for example, that *Adams v. City Bank & Trust Co. of Macon*, 5 Cir., 115 F. 2d 453, 134 A. L. R. 1215, certiorari denied, 312 U. S. 699, 61 S. Ct. 739, 85 L. Ed. 1133, has been strongly criticized as an instance where previous law was hung on to in the face of a new wording of the statute. See 3 Collier on Bankruptcy, 14th Ed. 1941, 911-916; 29 Calif. L. Rev. 522; 41 Col. L. Rev. 512; 36 Ill. L. Rev. 783.

not quoted in its entirety in the opinion. It must, however, be considered in full, for it is not fairly represented by short excerpts. It is one of a considerable number of paragraphs conferring extensive jurisdiction on courts of bankruptcy. It authorizes such courts to "require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property, to deliver the property in their possession or under their control" to the bankruptcy receiver or trustee or to the debtor or other person entitled to it under an arrangement or plan under the Act, "and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, That such delivery and accounting shall not be required, except in proceedings under chapters 10 and 12 of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of [fol. 32] bankruptcy." There follow important provisions as to the proceedings upon the accounting by virtue of which the bankruptcy court shall re-examine and determine the propriety and reasonableness of the receiver's disbursements to himself and to others for services and expenses; and "unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to" the bankruptcy proceeding, the court shall surcharge the receiver for excessive or improper charges.

Prior to 1938 there was absolutely nothing in the Bankruptcy Act authorizing this sort of action. Receivers, assignees, and trustees were replaced, but this was generally done on a theory that, since §3, 11 U. S. C. A. §21, made the appointment of such a person an act of bankruptcy, it was "necessarily implied" that the officer was to be displaced. *Randolph & Randolph* v. *Scruggs*, 190 U. S. 533, 536, 23 S. Ct. 710, 47 L. Ed. 1165; *In re Watts*, 190 U. S. 1, 23 S. Ct. 718, 47 L. Ed. 933. In this light, it is obvious that pre-existing law was limited by the necessity of relying on implications.[2] It seems a little strange, therefore,

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[2] It has never even been settled that a foreclosure receiver is not a receiver under §3. A dictum in *Standard Accident Ins. Co.* v. *B. T. Sheftall & Co.*, 5 Cir., 53 F. 2d 40, says that he is not; but in *In re 211 East Delaware Place Bldg. Corp.*,

to interpret a statutory grant of power as if it allowed the court to do only directly what formerly could have been done by indirection without statutory authority.

If the section is approached without such semi-historical preconceptions, it is at once seen that on its face "receiv- [fol. 33] ers" must include receivers in aid of foreclosure because of the proviso allowing for displacement of receivers where Chapters X and XII are involved, regardless of when they were appointed. Under §131(3), (4) of Chapter X, 11 U. S. C. A. §531(3), (4), an involuntary petition may be filed if, as a substitute for an act of bankruptcy under §3, "an indenture trustee or a mortgagee under a mortgage is, by reason of a default, in possession" or "a proceeding to foreclose" is pending. And under Chapter XII, which deals only with real property, the only likely kind of receiver is one to collect rents and profits in foreclosure.[3] The opinion avoids this difficulty by reading "receivers" and "trustees" distributively to cover those receivers which must be included, but excluding all others which under previous law were not subject to displacement.

This "distributive" reading is a deceptively simple solution. Here the essentially conflicting nature of the earlier

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D. C. N. D. Ill., 14 F. Supp. 96, Judge Evans, sitting as a district judge, said that he is. In *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591, the Court refused to answer the question. Under the rationale of displacement by implication, it was not even clear under previous law that a foreclosure receiver would not be displaced if appointed within four months of a petition in bankruptcy.

[3] It is said that §2a(21) is not complete because it does not include receivers in railroad receiverships in the proviso eliminating the four months' restriction as to Chapters X and XII. But under §77(a), 11 U. S. C. A. §205(a), the court is given "exclusive jurisdiction of the debtor and its property wherever located," and under §77(i), there is a complete enumeration of the steps to be taken to terminate a receivership once a petition under §77 is filed. It should also be noted that the earlier sections of the Bankruptcy Act have little or nothing to do with railroads, because under §4, 11 U. S. C. A. §22, they are excluded from the class of persons who may become bankrupts.

precedents takes on increased importance. For this reading results in giving "receiver" several meanings in addition to those which the majority concedes are required by the context of §2a(21) itself. For example, a receiver appointed under a creditor's bill was displaced if appointed within four months of bankruptcy, *Miller* v. *Potts*, 6 Cir., 26 F. 2d 851; *Blair* v. *Brailey*, 5 Cir., 221 F. 1, certiorari denied 238 U. S. 634, 35 S. Ct. 938, 59 L. Ed. 1499, but not [fol. 34] if appointed more than four months before. *Blair* v. *Brailey, supra*. The rationale was that displacement followed by implication from the fact that §67, 11 U. S. C. A. §107, outlawed the lien as a fraudulent transfer.[4] Also, a receiver appointed under a stockholder's bill could be replaced no matter when he was appointed, *Miller* v. *Potts, supra; In re Knox Consol. Coal Co.*, D. C. S. D. Ind., 50 F. 2d 248. Must we now read "receiver" as applying to all displacements under the previous rule regardless of the four months' limitation, or do we limit ourselves to reading it to include only such previous law as is not otherwise necessarily altered? If so, §2a(21) has become an empty shell indeed.

There are other types of receiver which must be conjured with. Under the majority opinion, receivers collecting rents under valid mortgages are not covered by §2a(21). Suppose the mortgage is invalid under §§60, 67, or 70, 11 U. S. C. A. §§96, 107, 110? If this differentiation is read into the section, then a broad grant of *jurisdiction* depends on the myriad technical rules of validity arising out of §§60, 67, and 70. Then there are peculiar sorts of receivers whose status was determined under previous law, such as the temporary receiver appointed pending judicial determination of a charge that an indenture trustee had committed fraud. *In re Greyling Realty Corp.*, 2 Cir., 74 F. 2d 734, certiorari denied *Troutman* v. *Compton*, 294 U. S. 725, 55 S. Ct. 639, 79 L. Ed. 1256. Martin Act receivers raise a peculiar problem. Under our decision in *Elfast* v. *Lamb*,

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[4] Of course, this four months' differentiation is written into §2a(21), and it may be said that "receiver" need not have two meanings to accomplish any differentiation. But if some differentiations are covered into the section, it becomes less justifiable to attempt surreptitiously to cover in other differentiations by reading "receivers" and "trustees" distributively.

2 Cir., 111 F. 2d 434, we said that no act of bankruptcy was committed when a Martin Act receiver was appointed. Un- [fol. 35] der previous rules, that would preclude his displacement. But in *In re Koch*, 2 Cir., 116 F. 2d 243, certiorari denied *Hirson* v. *Koch*, 313 U. S. 565, 61 S. Ct. 941, 85 L. Ed. 1524, we intimated that a Martin Act receiver might be displaced because he was a receiver under §2a(21).

The distributive reading thus becomes subject to such exceptions as get written into §2a(21) specifically. A lot of litigation will have to come along before we ever know who is a receiver and who is not under §2a(21).[5] This is the surer because under modern codes generally and New York law in particular an "equity receivership" is not a self-defining term, but is a pure anachronism.[6] A broad, simple provision will soon become encrusted with so many exceptions that no one will ever be sure just what the bankruptcy court's powers are. I prefer to read §2a(21) as it is written and thus settle the issue simply.

It should be noted further that if the statutory term is to be limited to "equity" receivers, and if these are those appointed either to reorganize or to wind up corporations (what else can they mean?), then the provision was already practically out of date when it was written in 1938; for, as is well known, 77B had brought corporate reorganization practice into the bankruptcy aegis.

[fol. 36] Section 2a(21) also speaks of "agents authorized to take possession of or to liquidate a person's prop-

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[5] Compare discussion of receiver in supplementary proceedings in *In re Clement-Rowe Press*, D. C. S. D. N. Y., 42 F. Supp. 209.

[6] Under New York statutes, receivers may be appointed in so many different forms and types of suits as to indicate that this is a general remedy for the preservation of all types and conditions of property—as, indeed, it should be. Needless to say, the term "equity receivership" does not appear. If it be assumed that this refers to a receiver in a proceeding for the dissolution or supervision of the affairs of a corporation, the remedies here are also carefully defined by statute in the General Corporation Law; the main provision stating types of corporate receivers includes foreclosure receivers indiscriminately with the rest. N. Y. General Corporation Law, §150.

erty." The majority opinion concedes doubt as to what this means, but is content again to rely on general bankruptcy rules apart from the section itself. If litigation *ad nauseam* will be necessary to get "receivers" and "trustees" defined, the situation will be even worse with respect to "agents," for this is a kind of person less well known than receivers. The Senate Committee's Report on the Chandler Act referred to them as "custodial or liquidating agents." Sen. Rep. No. 1916, 75th Cong., 3d Sess., 1938, 12. This suggests the wide sweep of the statute, for "custodial agents" certainly connotes agents of limited functions. But must we go on for years trying to find out which custodial or liquidating agents are covered by §2a (21) and which are not? Again, I should prefer to read the section as written, rather than start a process of jerry-building exceptions. This is the conclusion reached in the very recent case of In re Rosenberg 7 Cir. 128 F. (2).

The majority opinion asserts, however, that this distinction so drawn is based on a simple proposition that anyone in possession of property subject to the exclusive possession of the bankruptcy court is displaced, and that any other is not. Of course, this is the very thing which §2a(21) tells us; it is a section giving jurisdiction to the bakruptcy court. But leaving that aside; other objections exist. In the first place, it is no simple matter to know whether or not exclusive jurisdiction exists in the bankruptcy court. I have already alluded to the problem of the invalid mortgage. The force of §2a(21), therefore, seems to me to be to sweep all such property into the bankruptcy court for determination of its status. Secondly, it is not at all settled that the bankruptcy court's power of inhibiting foreclosures begun after bankruptcy, *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645, cannot be extended back four months. *Straton* v. *New*, [fol. 37] 283 U. S. 318, 51 S. Ct. 465, 75 L. Ed. 1060, held that where a receiver had been in possession more than four months before bankruptcy, he could not be displaced. Thus, the Supreme Court left undecided the status within four months. Since the rationale of the cases springs from the rule of comity that the court first obtaining jurisdiction retains it, *Straton* v. *New*, *supra*, 283 U. S. at page 322, the fact that §2a(21) grants the bankruptcy court power to extend its jurisdiction backward four months would seem to answer the very question left by the *Isaacs*

and *Staraton* cases, Cf. *Florence Trading Corp.* v. *Rosenberg*, 2 Cir., 128 F. 2d 557, 561.

Further, I think there are many strong reasons of public policy for construing §2a(21) to allow displacement of any person in possession other than the secured creditor himself. The whole purpose of bankruptcy is orderly equitable distribution of a debtor's property. In ordinary bankruptcy, to be sure, Congress has left secured property outside the distribution hierarchy. But we need by no means infer from this that assets of the debtor must be eaten up by exorbitant charges for administering secured assets outside the bankruptcy court. If the cost of a foreclosure receivership were borne by the mortgagee and the equity fully turned over to the bankruptcy court, I would not be quite so solicitous of the bankruptcy power.[7] But to say that unsecured creditors cannot protect their interests by invoking the bankruptcy power in supersession of non-bankruptcy liquidation is to fritter away some of the protection which bankruptcy was designed to afford. Compare [fol. 38] §314, 11 U. S. C. A. §714, of Chapter XI and §614, 11 U. S. C. A. §1014, of Chapter XIII, which allow stay of the commencement or continuation of proceedings to enforce liens, even though neither of these chapters provides for alteration of secured debts. *Cf. Lockhart* v. *Garden City Bank & Trust Co.*, 2 Cir., 116 F. 2d 658, 660. It is anomalous to say that unsecured creditors' rights can be protected thus, but that they cannot be protected by a cutting down of exorbitant expenses of foreclosure. It should also be noted that even if we assume that §2a(21) gives the trustee power of sale over secured property taken over by the bankruptcy court, secured creditors might be a little delayed in realizing on their security, but otherwise would lose nothing. The trustee's only interest is to obtain a sale price over and above the indebtedness, and it is highly unlikely that he would request possession otherwise.

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[7] Though even here, I think the bankruptcy court should have some power, within the limits of four months, to see to it that the bankrupt's equity is not frittered away by a disadvantageous foreclosure sale. See *Isaacs* v. *Hobbs Tie & Timber Co.*, *supra*; *Lincoln-Alliance Bank & Trust Co.* v. *Dye*, 2 Cir., 108 F. 2d 38; *In re Franklin Garden Apartments, Inc.*, 2 Cir., 124 F. 2d 451; *In re White Plains Ice Service, Inc.*, 2 Cir., 109 F. 2d 913.

Moreover, it is confusing and unreal to regard a state receivership as essentially the mortgagee's remedy designed as a kind of substitute for the immediate or piepowder relief to which a mortgagee should be entitled. For under modern law the mortgagee is far from entitled to immediate relief; and the receiver is an officer of court with duties to others than merely the secured creditor alone. This case is striking proof of that fact. Here a purchaser of a junior lien eventually paid off the mortgage, and hence the receiver, as it turned out, should have been working for the substantial interests of the bankruptcy creditors, though the bankruptcy court is now held to have no control over his disbursements, and powerless to prevent him from paying himself and his attorney very well and leaving only a deficit for the estate.

I have discussed §2a(21) at this length partly because the majority opinion chiefly relies upon it, and partly because an understanding of its philosophy aids in a correct [fol. 39] conception of §69d. But so far as this case is concerned §69d is controlling, for it covers the case of acts by a state receiver after the bankruptcy petition is filed and here every collection of the receiver was after bankruptcy. It reads: "Upon the filing of a petition under this Act, a receiver or trustee, not appointed under this Act, of any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition." And he must file a schedule setting forth a summary "of the property in his charge" and of the liabilities of the estate, and a sworn statement of his administration, and he "shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court."

Section 69d was another completely new section of the Act, and my observations above apply with even greater force here. In fact, even on the assumption that §2a(21) covers only property subject to the exclusive jurisdiction of the bankruptcy court and that mortgaged property is excluded, I do not see how §69d can be ignored. It speaks of a receiver "of *any of* the property of a bankrupt"; it covers action subsequent to the filing of a petition in bankruptcy; it does not deprive a state court of jurisdiction.

All it does is effectively protect the bankruptcy court's interest in property administered in other proceedings.

The fact that the House Committee in its report said that this provision was designed to make it possible for "equity receivers" to know how to proceed with further administration between filing of an involuntary petition and adjudication certainly does not state an express or clear limitation. Its purpose applies just as much to a receiver of "any of [fol. 40] the property of a bankrupt" as to a receiver liquidating a corporate estate.[8]

Since, as stated, every move made by the receiver in the case before us followed the filing of the petition, §69d must apply, no matter what limitations we may wish to read into §2a(21). Under §2a(21), the bankruptcy court has power to order a turnover, which it presumably might not do in some instances. But §69d is apparently mandatory. By the terms of the provision, all of the rents collected here were without authorization. Presumably the bankruptcy court could deny the receiver any compensation for having proceeded without first submitting to the court's jurisdiction. At any rate, as I view it, he is clearly subject to the supervision of the bankruptcy court. True, his accounts were actually passed upon by the state court, but this was long after bankruptcy and really by sufferance or delay of the bankruptcy court.

I cannot see that it is any answer to say that this exertion of federal power would be "galling" to state courts. Any exertion of federal power is "galling" to a state if one

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[8] Accurately considered, of course, the words "equity receivers" adequately describe any of the various receiverships in New York, note 6, *supra*. Even if the Committee had in mind the more limited corporate receiverships, it should be noted that it was affirming a general proposition of applicability, not *negating* other unmentioned things. This is made even clearer by the briefer statement in the Senate Committee Report, Sen. Rep. No. 1916, 75th Cong., 3d Sess., 1938, 18; and see also its more inclusive definition of the coverage of §2a(21) cited above, *Ibid.* 12. The House Report also said of this that it gave to bankruptcy courts much needed power over the administration of equity receiverships, assignments for the benefit of creditors, "and the like." H. R. Rep. No. 1405, 75th Cong., 1st Sess., 1937, 20.

wishes to be epithetical. If one starts with the epithet, Congress is confronted at once with a presumption against it which can be dispelled only by the most explicit language. When it is remembered that the federal power over bank-[fol. 41] ruptcy legislation is an enumerated power of the Constitution, it is unseemly to insist on indulging the feelings of state courts. *Cf. Prudence Realization Corp.* v. *Geist*, —— U. S. ——, 62 S. Ct. 978; and see 49 Yale L. J. 1090 for a discussion of the cases holding state insolvency acts suspended *ipso facto* by the Bankruptcy Act. Experience has taught us the necessity of one uniform national system of bankruptcy; it is too late to save state pride here—if, indeed, it is actually engaged—by minor and irritating limitations upon the full relief which should lie in the hands of the bankruptcy courts.

[fols. 42,43] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of

JOHN M. RUSSELL, INC., Bankrupt,

ALLAN D. EMIL, Trustee, etc., Appellant,

JUDGMENT—Filed August 31, 1942

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 4, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,052, U. S. Circuit Court of Appeals, Second Circuit. Term No. 551. Allan D. Emil, as Trustee in Bankruptcy of John M. Russell, Inc., Petitioner, vs. Harry Hanley, Receiver. Petition for a writ of certiorari and exhibit thereto. Filed November 27, 1942. Term No. 551 O. T. 1942.